

**PROSECUTION RESPONSE TO
DEFENSE MOTION:
ARMED CONFLICT IN
AFGHANISTAN HAS ENDED**

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15 October 2004

- a. As the United States Supreme Court succinctly stated in *Hamdi v. Rumsfeld*, 124 S.Ct. 2633 (2004):

Id. at 2635.

- ¹ Available at www.whitehouse.gov/news/releases/2001/09/20010914-12.html.

c. War planning against the perpetrators of September 11, 2001 – al Qaida – began immediately following those attacks. On September 20, 2001, President Bush, in an address to the Joint Session of Congress and the American people,² noted that the September 11th attacks constituted “an act of war against our country.”³ He also condemned the Taliban regime and put it on notice that it must either assist in bringing the terrorists to justice or “share in their fate.”⁴ Warning the American public to expect “a lengthy campaign, unlike any other we have ever seen,”⁵ the President delivered a message to the United States military: “Be ready. I’ve called the Armed Forces to alert, and there is a reason. The hour is coming when America will act, and you will make us proud.”⁶

d. Indeed, the September 11th attacks on the United States were an act of war, sparking the commencement of major combat operations in Afghanistan against the al Qaida network and the Taliban regime, known as Operation Enduring Freedom. But the war did not leap into existence on September 11, 2001. Al Qaida had declared and been waging this war against the United States years prior to the September 11th attacks. Final Report of the National Commission on Terrorist Attacks Upon the United States, Authorized Edition (2004), at 46, 48, 59. As a federal court has said, “Certainly the terrorist attacks that have followed, if not preceded, the 1998 embassy bombings – the 1996 bombing of the military barracks at Khobar Towers, Saudi Arabia, the 2000 suicide attack on the U.S.S. Cole in Yemen, and most tragic and violent of all, the attacks on our own soil of the Pentagon, the World Trade Center, and in Pennsylvania – are sufficient to confirm the President’s assertion that a state of war exists between the United States and [al Qaida].” El-Shifa Pharmaceutical Industry Corporation. v. United States, 55 Fed. Cl. 751, at 771-772. (Fed. Cl. 2004).

e. On October 7, 2001, the President announced that on his orders, the U.S. military had “begun strikes against al Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan.” Presidential Address to the Nation of October 7, 2001.⁷ Operations in Afghanistan continue,⁸ as do worldwide operations against al Qaida.⁹

² Address to a Joint Session of Congress and the American People of September 20, 2001, available at www.whitehouse.gov/news/releases/2001/09/20010920-8.html

³ Id.

⁴ Id.

⁵ Id.

⁶ Id.

⁷ Available at www.whitehouse.gov/news/releases/2001/10/20011007-8.html.

⁸ See, e.g., WASHINGTON, March 13, 2004 -- Operation Mountain Blizzard has successfully ended in Afghanistan, and Operation Mountain Storm has begun, coalition officials in the Afghan capital of Kabul announced in a news release today. In the two months of Mountain Blizzard, the coalition conducted 1,731 patrols and 143 raids and cordon-and-search operations. They killed 22 enemy combatants and discovered caches with 3,648 rockets, 3,202 mortar rounds, 2,944 rocket-propelled grenades, 3,000 rifle rounds, 2,232 mines and tens of thousands of rounds of small-arms ammunition, the news release said. Mountain Storm is the next in the continuing series of operations in the south, southeast, and eastern portions of Afghanistan designed to destroy terrorist organizations and their infrastructure while continuing to focus on national

5. Discussion. “The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by ‘universal agreement and practice,’ are ‘important incident[s] of war.’ *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2640 (U.S.2004) citing *Ex parte Quirin*, 317 U.S. 1, 28 (1942) (emphasis added). “The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again.” *Id.* “It is a clearly established principle of the law of war that detention may last no longer than active hostilities.” *Id.* (citations omitted). Enemy combatants “can be detained during an armed conflict, but the detaining country must release and repatriate them ‘without delay after the cessation of active hostilities,’ unless they are being lawfully prosecuted or have been lawfully convicted of crimes and are serving sentences.” *Id.*, at 2641, citing Paust, *Judicial Power to Determine the Status and Rights of Persons Detained without Trial*, 44 Harv. Int’l L. J. 503, 510-511 (2003) (emphasis added).

In the first international criminal tribunals held since World War II, the International Criminal Tribunal for the former Yugoslavia (hereinafter “ICTY”) came to one concise definition of when an armed conflict exists for purposes of applying international law: “An armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between states *or protracted armed violence between governmental authorities and organized armed groups*, or between such groups within the states.... International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached...” *Prosecutor v Dusko Tadic, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction*, paragraph 67, International Criminal Tribunal for the Former Yugoslavia, 2 October 1995 (Cassese, J). This definition has become the generally accepted definition of armed conflict in international law. See Rome Statute of the International Criminal Court, Article 8.2(f)¹⁰; *see also* *Prosecutor v Kunarac, Judgment*, paragraph 56, International Criminal Tribunal for the Former Yugoslavia, 12 June 2002.

Applying this definition, it is clear that the United States is at war, first and foremost, with al Qaida. The operations levied by the United States against the Taliban were only necessary after the Taliban refused to turn over Usama bin Laden and others responsible for the September 11th attacks, and for its support of al Qaida’s terrorist operations within Afghanistan. Before the Taliban refused to cooperate, before U.S. forces were sent into Afghanistan, the United Nations, the North Atlantic Treaty Organization, and other international bodies had invoked collective defense provisions used for international armed conflicts, and Congress had passed its 2001 AUMF. Had the

stability and support, officials said. See

http://www.defenselink.mil/news/Mar2004/n03132004_200403135.html

⁹ See, e.g., Remarks as Delivered by Secretary of Defense Rumsfeld, New York City, New York, October 4, 2004 (the war against al Qaida “will likely go on for years”).

¹⁰ In fact, although the United States is not party to the ICC, as of 27 September 2004, 97 countries are State parties to the Rome Statute of the International Criminal Court and have accepted this definition. <http://www.icc-cpi.int/statesparties.html>

Taliban acceded to the President's demands, there would no less be an international armed conflict against al Qaida.

Thus, there is an international armed conflict, but it is not just about the Taliban and Afghanistan as the Defense suggests; it is about the international terrorist organization al Qaida. Al Qaida has conducted attacks across the globe, to include East Africa, Yemen, the United States, and other locations. This is truly a global war against a determined, organized, and capable enemy.

As to duration of the conflict, the Prosecution will offer more detailed evidence at trial that demonstrates it started as early as the early 1990s; for the purpose of this motion, suffice it to say that it predates September 11, 2001, and continues to date.¹¹

Hostilities in Afghanistan against the Taliban as well as al Qaida clearly are ongoing. Contrary to the Defense's position, Operation Enduring Freedom is a continuing military operation and hostilities continue sufficient to warrant the continued detention and prosecution of the Accused. According to the Department of Defense website on October 7, 2004, marking the third anniversary of Operation Enduring Freedom, fighting continues in 2004.¹² In late June 2004, the Supreme Court of the United States also expressly recognized the existence of hostilities sufficient to continue application of the laws of war in Afghanistan: "Active combat operations against Taliban fighters apparently are ongoing in Afghanistan." *Hamdi*, 124 S.Ct. at 2642 (2004) *citing e.g.*, Constable, U. S. Launches New Operation in Afghanistan, Washington Post, Mar. 14, 2004, p A22 (reporting that 13,500 United States troops remain in Afghanistan, including several thousand new arrivals); J. Abizaid, Dept. of Defense, Gen. Abizaid Central Command Operations Update Briefing, Apr. 30, 2004, <http://www.defenselinkmil/transcripts/2004/tr20040430-1402.html>. "If the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of 'necessary and appropriate force,' and therefore are authorized by the AUMF." *id.*

What is likely the strongest, yet most unfortunate evidence regarding the existence of continued hostilities, are continued casualties. As recently as September 20, 2004, two Army soldiers were killed in Afghanistan when a patrol was ambushed by small-arms fire and rocket-propelled grenades, and an observation post was fired on by

¹¹ For example, subsequent to the bombings of United States embassies in Kenya and Tanzania on August 7th 1998, President Clinton ordered the United States forces to strike terrorist-related facilities, belonging to al Qaida, in Afghanistan and Sudan on August 20th 1998. (Archived Presidential statements from <http://www.washingtonpost.com/wp-srv/inatl/longterm/eafricabombing/stories/text082098b.htm>) On the same day, after carrying out the missile attacks, and in compliance with United Nations Article 51 notice requirements, Bill Richardson, U.S. Ambassador to the United Nations, sent a letter to the Security Council stating that the United States strike was in reaction to a "series of armed attacks" by "the Bin Ladin organization" against U.S. Embassies and U.S. nationals. <http://usembassy-australia.state.gov/hyper/WF980821/epf508.htm>

¹² See http://www.defenselink.mil/news/Mar2004/n03132004_200403135.html

anti-Coalition forces.¹³ The facts are clear that the armed conflict continues and a general conclusion of peace has not been reached.

The Defense points to what it terms “Taliban’s final surrender in Kandahar that occurred on 17 November 2001,” citing no source. This is an inaccurate reference. On 24 November 2001, Taliban leaders surrendered near the city of Konduz.¹⁴ On 7 December 2001, Taliban leaders surrendered at Kandahar.¹⁵ Moreover, it is clear that irrespective of these tactical surrenders, there never was a general conclusion of peace between the Coalition and the Taliban, let alone al Qaida.

The armed conflict the United States is engaged in with al Qaida did not begin on 7 October 2001; nor did it end on 22 December 2001. Such an assertion is simply not supported under the generally recognized definition of “armed conflict” under international law. Moreover, even were hostilities to have ended, the International Committee of the Red Cross¹⁶ has opined that prosecutions for violation of the laws of war are actually more appropriately tried *after* the hostilities have ended:

...it may still be wondered whether the person accused of war crimes can and should be tried during hostilities. The International Committee of the Red Cross has pointed out on several occasions, notably before the meeting of Government Experts in Geneva in 1947, how difficult it is for an accused person who is to be tried by a military tribunal to prepare his defence during hostilities. How, indeed, could he bring proof which might lessen or even disprove his responsibility? Cases clear enough for a verdict to be passed before the end of hostilities will doubtless remain an exception.

International Committee of the Red Cross, Commentary on the Geneva Conventions of 12 August 1949 596 (Oscar Uhler & Henri Coursier, eds., 1958).¹⁷ Thus, even if the conflict had ended, there would be no cause for the defense to claim that the charges against the Accused should be dismissed, as trying the Accused by military commission would be equally permissible *after* the cessation of hostilities.

Since the armed conflict between the United States and al Qaida continues to this day, and because the law is clear that it is proper to try individuals for violations of crimes of war *even after* the end of hostilities, the defense motion to dismiss all charges should be denied.

¹³ See <http://www.defenselink.mil/releases/2004/nr20040922-1311.html>

¹⁴ (<http://cnn.worldnews.printhis.clickability.com/pt/cpt?action=cpt&title=CNN.com>). Even this report indicates that ‘hard –core Taliban fighters and al Qaida troops, mostly from outside Afghanistan, have vowed to keep fighting.

¹⁵ (www.foxnews.com/printer_friendly_story/0,3566,40208,00.html)

¹⁶ The International Committee of the Red Cross acts as a guardian for international humanitarian law. See <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList109/7E2A3790156D885FC1256C5400268136>

¹⁷ Available at: www.icrc.org/ihl.nsf/bea7ecf1a7801c6241256739003e6369/83d26231d75c3884c12563cd0042eeb5

6. Table of Authorities:

- a. Hamdi v. Rumsfeld, 124 S.Ct. 2633, 2642 (2004)
- b. Prosecutor v. Dusko Tadic, *Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction*, paragraph 67, International Criminal Tribunal for the Former Yugoslavia, 2 October 1995 (Cassese, J)
- c. Rome Statute of the International Criminal Court, Article 8.2(f)
- d. Prosecutor v. Kunarac, *Judgment*, paragraph 56, International Criminal Tribunal for the Former Yugoslavia, 12 June 2002.
- e. Commentary on the Geneva Conventions of 12 August 1949 596 (Oscar Uhler & Henri Coursier, eds., 1958)
(www.icrc.org/ihl.nsf/bea7ecf1a7801c6241256739003e6369/83d26231d75c3884c12563c)

7. Witnesses/Evidence.

- a. Transcript, President Clinton's Press Conference August 20, 1998
<http://www.clintonpresidentialcenter.org/legacy/082098-speech-by-president-address-to-nation-on-terror.htm>
- b. Transcript, General Shelton's briefing on the missile strikes in Sudan and Afghanistan, 20 August 2004
http://www.pbs.org/newshour/bb/military/july-dec98/cohen_8-20.html
- c. Letter from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council 2/1998/780, 20 August 1998
www.jb.law.uu.nl/jb-vol/US-SC.pdf
- d. Joint Resolution by Congress to authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States.
http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_public_laws&docid=f:publ040.107
- e. Transcript, President Bush's address of 7 October 2001 announcing the beginning of strikes against al Qaida training camps and military installations of the Taliban regime in Afghanistan.
<http://www.whitehouse.gov/news/releases/2001/10/20011007-8.html>
- f. White House Statement by the Press Secretary on the Geneva Convention, May 7, 2003
<http://www.whitehouse.gov/news/releases/2003/05/print/20030507-18.html>
- g. Department of Defense News Release No. 761-04, August 9, 2004
<http://www.defenselink.mil/releases/2004/nr20040809-1100.html>

- h. Department of Defense News Release No. 941-04, September 22, 2004
<http://www.defenselink.mil/releases/2004/nr20040922-1311.html>
- i. Statement by NATO invoking Article 5 of the Washington Treaty
<http://www.nato.int/docu/pr/2001/p01-124e.htm>
- j. United Nations Resolution 1368
<http://ods-dds-ny.un.org/doc/UNDOC/GEN/N01/533/82/PDF/N0153382.pdf>
- k. Department of Defense Operation Enduring Freedom Timeline & related links
www.defenselink.mil/home/features/1082004a.html

//Signed//

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